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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 419

LOCAL LODGE NO. 1836 OF DISTRICT 38 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL.,

PETITIONERS,

v.

LOCAL NO. 1505 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER LOCAL LODGE NO. 1836 OF DISTRICT 38 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

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Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 304 F.2d 360 (R. 76-78). The opinion of the Court denying the petition for rehearing is reported at 304 F.2d 367 (R. 87-88). The opinion of the District Court is reported at 201 F. Supp. 334 (R. 67-71).

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1962 (R. 78). A petition for rehearing was denied on July 19, 1962 (R. 89). The petition for a writ of certiorari was filed on September 6, 1962 and granted on November 19, 1962, 83 Sup. Ct. 255 (R. 89).

Question Presented

Does the District Court have jurisdiction under Section 301 of the Labor-Management Relations Act to compel arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the bargaining unit?

Statute Involved

The case involves Sections 8(b)(4)(i) and (ii), Section 9(e)(1)(A), 9(e)(1)(B), 10(k), and Section 301 (a) and (b) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), which are printed as Appendix "A" to the brief.

Statement

This suit is brought under Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C.A., Section 185, to compel arbitration pursuant to the terms of a collective bargaining contract.

On August 8, 1956, the respondent (hereinafter referred to as the "Company") and the petitioner (hereinafter referred to as the "I.A.M.") entered into a collective bargaining agreement (R. 7). Article I of said agreement set forth the job classifications covered by the agreement and

incorporated by reference job classification descriptions which describe in detail the work tasks covered by the agreement (R. 7). The agreement further provided that "any dispute between the Company and the Union, or between the Company and any employee, concerning the application of this agreement to any particular situation or whether it has been observed or performed" shall be submitted to arbitration (R. 9-13).

In accordance with Section 18.2 of the agreement (R. 11), the I.A.M. on November 7, 1958 filed a grievance alleging that the Company violated Article I of the agreement by assigning work encompassed by the agreement to employees outside the bargaining unit at times when the employees within the bargaining unit were ready, willing and able to perform such work (R. 23). By letter of November 10, 1958, the I.A.M. amended the grievance to include an allegation of violation of Article XIX (Seniority) of the agreement (R. 56). The grievance was processed through the grievance procedure set forth in the agreement and on February 4, 1959, the I.A.M. requested arbitration. This request was later withdrawn by the I.A.M. without prejudice to its right to renew its request in favor of continuing further discussions between the parties.

On September 8, 1959, the parties entered into a subsequent collective bargaining agreement to be effective from September 8, 1959 to May 31, 1961 (R. 57). Article I and Article XVIII of the 1956 agreement were carried forward in the new agreement without material change.

The parties continued their discussions of the grievance and when no agreement was reached, the I.A.M. again requested arbitration (R. 58). This request was refused by the Company (R. 61).

On February 3, 1961, the I.A.M. brought suit to compel arbitration of the grievance (R. 4-7). A petition for leave to intervene by Local No. 1305, International Brotherhood

of Electrical Workers, AFL-CIO (hereinafter referred to as "I.B.E.W.") was allowed by the court (R. 65).

A Motion for Summary Judgment was filed by the I.A.M. and thereafter the Company filed a cross-motion for Summary Judgment and a Motion to Dismiss for Lack of Jurisdiction (R. 66). The District Court allowed the I.A.M.'s motion and denied the Company's motions (R. 67). The court held that the grievance presented an arbitrable dispute under the agreement and that it had jurisdiction under Section 301 to compel arbitration. The court rejected the application of the preemption doctrine as not being applicable in the context of this case. The court also concluded that the I.B.E.W. had no right to intervene in an arbitration proceeding held under an agreement between Raytheon and I.A.M. To permit such intervention, the court held, would constitute an amendment to the agreement and impose new obligations upon the parties which had not been contracted for. Judgment was entered on January 24, 1962 ordering the Company to submit to arbitration the grievance described in the complaint and denying the I.B.E.W.'s request to become a party to said arbitration proceeding (R. 71).

From such order of the District Court, the Company and the I.B.E.W. appealed to the United States Court of Appeals for the First Circuit (R. 72). That court reversed the judgment of the District Court in a written opinion (R. 25), 304 F.2d 365. The court below held that it was without jurisdiction to compel arbitration in that the N.L.R.B. had exclusive jurisdiction over this dispute.

Summary of Argument

1. This is a suit brought under Section 301 to enforce an agreement to arbitrate. The issue sought to be arbitrated is whether the Company violated the agreement by assign-

ing work covered by the agreement to employees outside the bargaining unit at times when employees in the unit were available to do such work. The decision of the court below is in conflict with the decisions of this Court holding that the preemption doctrine is not applicable to suits brought under Section 301.

2. The court below was in error in characterizing this suit as one involving a question of representation to be resolved by the Board through a clarification of its certification. A certification is only a determination that a majority of employees in a designated unit have selected a particular labor organization as their bargaining representative. It is not an award of work and it is left to the parties in collective bargaining to spell out the work to be covered by the agreement. A work jurisdiction clause is of vital importance for it assures that the standards of the agreement will not be undermined by the assigning of such work to others outside the coverage of the agreement.

3. Since the I.A.M. has not committed any unfair labor practices, the Board does not have jurisdiction to hear and determine this matter under the jurisdictional dispute sections of the Act. The I.A.M. would be compelled to engage in conduct prohibited by the Act in order to obtain an adjudication by the Board under the jurisdictional dispute procedures.

4. The need for uniformity and the avoidance of conflicts in the decision-making process which underlie the preemption doctrine is not present in work assignment disputes. Even where a jurisdictional dispute exists within the meaning of the Act, the procedures provided in Section 10(k) emphasize voluntary means of resolving such disputes.

Argument

I. This Is a Suit to Compel Arbitration Pursuant to the Terms of a Collective Bargaining Agreement.

This is a suit brought under Section 301 to enforce an agreement to arbitrate. The issue sought to be arbitrated is whether the Company violated the agreement by assigning work embodied in the agreement to employees outside the bargaining unit at times when employees in the unit were available to do such work (R. 23-24). Since the agreement contains a standard arbitration clause requiring all disputes concerning the application of the agreement to be arbitrated (R. 9-13), the grievance is clearly arbitrable under the principles announced by this Court in the *Steelworkers* cases.[1] The court below concluded that it was compelled to depart from the announced federal policy of enforcing arbitration agreements because "exclusive jurisdiction to resolve the conflict between the parties is in the Labor Board. . ." In so holding, the court did not attempt to reconcile its conclusion with the statements of this Court that the doctrine of preemption announced in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 and related cases is inapplicable to suits to enforce collective bargaining agreements and that Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law' ". *Dowd Box Company* v. *Courtney*, 368 U.S. 502, 513; *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95, 101, n.9; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n.5; *Smith* v. *Evening News Association*, 31 U.S. L. Week 4041, (U.S. December 10, 1962).

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[1] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

The I.A.M. is certified as the exclusive bargaining representative for the Company's employees classified as: "Experimental and Development Machinists A, B and C; Machinists A, B and C; Maintenance Machinists; Die Makers A, B and C" (R. 7). The certification does not describe the work tasks to be performed by the employees in these classifications nor does it preclude the employer from altering work assignments (*infra*, II). The task of defining the work covered by the agreement is for the parties in collective bargaining. The definition of the work to which the terms and conditions of the agreement are applicable is of particular significance for it assures that the standards of the agreement will not be undermined by assigning such work to others outside the coverage of the agreement. Every condition of employment bargained for by the union is meaningless to the extent that the employer is free to have such work performed by employees to whom these conditions do not apply.[2] Compare *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283. The unit represented by the I.A.M. consists of highly skilled and relatively highly paid craftsmen. The employer may well desire to have its work done by semi-skilled operators rather than craftsmen. We fully concede the right of the employer to make that kind of judgment. But unions have a correlative right under collective bargaining to seek to incorporate into collective bargaining agreements provisions that will afford protection against the destruction of their jobs. The employer's interest in getting the work done for the cheapest wage is counter-balanced by the employees' desire that they retain their jobs and the standards of employment. The conflict

[2] As one arbitrator has said, "To allow the Company, after signing an agreement covering standards of wages and conditions . . ., to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the contract and destroy the meaning of the collective bargaining relations." *A. J. Juilliard Co.*, 21 L.A. 713, 724, (1953).

of economic interest in this area may become even more pronounced during periods of rapid technological change. This issue deals with a "condition of employment" and thus, is a proper subject of bargaining under 8(d) and 9(a). *Town & Country Mfg.*, 136 NLRB No. 111; *cf. Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330.[3] I.A.M. and Raytheon have incorporated into their agreement the job descriptions which define in great detail the work covered by the agreement (R. 25-55). It is our contention that the Company violated the agreement when it assigned such work to employees outside the bargaining unit at times when employees in the unit were available. Whether we are correct in this contention is of course a question for the arbitrator and not the courts. *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574. All that we are seeking in this proceeding is to compel the Company to submit this dispute to arbitration in accordance with its agreement. *cf. United Steelworkers* v. *New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959).

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[3] There is no practical difference from the standpoint of preserving work standards and enforcing an agreement whether the work which the union claims under its agreement is assigned to other employees or is contracted to another employer for processing by the latter's employees as in the typical subcontracting situation. In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 584, this Court observed that the latter disputes are "grist in the mills of the arbitrators". A similar observation could be made with respect to work assignment disputes. *Allegheny Ludlum Steel Corp.*, 39 LA 190 (1962); *Continental Can Co.*, 37 LA 738 (1961); *Collins Radio Co.*, 36 LA 815 (1961); *Houdaille Industries Inc.*, 35 LA 455 (1960); *General Motors Corp.*, 37 LA 193 (1961); *National Lead Co.*, 36 LA 963 (1961); *Rayonier, Inc.*, 36 LA 883 (1961); *Continental Oil Co.*, 32 LA 668 (1959); *Standard-Coosa-Thatcher Co.*, 30 LA 710 (1958); *Chesapeake & Ohio R. Co.*, 29 LA 381 (1957); *Hamm Brewing Co.*, 28 LA 46 (1957); *Great Lakes Pipe Line Co.*, 27 LA 748 (1956); *Reynolds Metals Co.*, 26 LA 756 (1956); *Colorado Fuel & Iron Corp.*, 25 LA 230 (1955); *Bridgeport Brass Co.*, 25 LA 151 (1955); *Celotex Corp.*, 24 LA 369 (1955); *Haddon Craftsmen Inc.*, 23 LA 210 (1954); *Stewart Warner Corp.*, 22 LA 547 (1954); *Wheeling Steel Corp.*, 21 LA 35 (1953).

II. The Dispute Between the Parties Does Not Involve Either a Question of Representation or a Jurisdictional Dispute Within the Meaning of the Act.

The Circuit Court's characterization of this suit as one involving a question of representation is fundamentally erroneous. The Board itself has repeatedly held that a certification is not an award of work but only a determination that a majority of employees in a designated unit have selected a particular labor organization as their representative for purposes of collective bargaining.[4] *General Aniline & Film Corp.*, 89 NLRB 467; *Plumbing Contractors Association*, 93 NLRB 1081; *Employing Plasterers Association*, 118 NLRB 17. Any questions concerning work assignments are left to the parties to resolve through collective bargaining and in the administration of their agreements. *McDonnell Aircraft Corp.*, 109 NLRB 930; *New Gravure Printing Company*, 136 NLRB No. 127. *cf. Smith* v. *Evening News Association*, 31 U.S. L. Week 4041, n. 6, (U.S. December 10, 1962). *Hercules Motor Corp.*, 136 NLRB No. 145; *International Harvester Co.*, 138 NLRB No. 88. Thus the Board, to which the court below would give exclusive jurisdiction over this grievance as a representation matter, has specifically held that it should be viewed as a contract dispute to be resolved through the grievance and arbitration procedure.

The Board's procedures are not the exclusive means available for the determination of bargaining representatives. An employer and a union may resolve disputes

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[4] The Court's error was due in large part from its rejection of the distinction between questions of representation and disputes over work assignments. The distinction between these concepts—with which the Court was "not impressed"—was made part of the framework of the statute by Congress itself when it provided separate procedures for resolving the two types of controversy. Compare Sections 9(b) and (c) with Sections 10(c) and (k).

over representation through privately agreed means and many unions operate without Board certification. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. Even if we assume an implied authority in the Board to clarify a certification, it cannot act in the absence of a prior certification.[5] Therefore, the rationale of the decision below creates the paradox that a non-certified union can obtain judicial enforcement of its recognition clause but a certified union is restricted to the processes of the Board.

Since this case involves a dispute over the assignment of work rather than representation, it is more closely akin to a jurisdictional dispute. But it is nonetheless not a jurisdictional dispute in the sense of Section 8(b) (4) (D) and Section 303, for as the Court of Appeals for the Second Circuit noted in *Local 35 of the International Hod Carriers Union* v. *Mason Tenders District Council*, 291 F.2d 496, 504 (2nd Cir. 1961):

> "It is obvious from reading these sections that this statutory scheme does not purport to give the Board general supervisory powers over controversies between labor organizations relating to work assignments. The Board may act only when a charge has been filed, and a mere disagreement over work assignments is not enough to create an unfair labor practice. Before a labor organization can be said to have violated Section 8(b) (4) (D), it must have engaged in one of the activities proscribed in Section 8(b) (4) (i) and (ii)."

The I.A.M. has not engaged in any conduct which falls within Section 8(b) (4) (i) or (ii). Consequently, the decision of the court below will contribute to economic conflict since "the denial of arbitration would have the

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[5] *Bell Telephone Company of Pennsylvania*, 118 NLRB 371; *American Stores Company*, 130 NLRB 678.

paradoxical result of forcing the Union to engage in conduct prohibited by 8(b) (4) (D) as the only means of obtaining adjudication of its claim to this work." *Carey v. General Electric Co.*, 50 LRRM 2119, 2132, (S.D.N.Y. April 18, 1962) Moreover, it would require the union to risk a damage suit under Section 303 in order to obtain an adjudication from the Board under the jurisdictional dispute procedures.[6]

The line that Congress has drawn with respect to jurisdictional disputes is quite definite. The Board is empowered to intervene and resolve jurisdictional disputes only after a party has engaged in one of the activities proscribed in Section 8(b) (4) (i) and (ii).[7] Absent such conduct, the Board is without jurisdiction and the parties are left to their own devices. Moreover, even where a jurisdictional dispute within the meaning of Section 8(b) (4) (D) exists, the procedures provided in Section 10(k) emphasize voluntary means of resolving such disputes. The Board only determines the dispute after the parties have failed to agree upon a means of settling their differences. In arriving at a determination, the Board decides each case on its own facts, and considers may factors including arbitrators awards and the terms of agreements.[8] *NLRB* v. *Radio*

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[6] There is no assurance of a Board adjudication since the employer could seek damages under Section 303 but refrain from filing charges with the Board. There is also the possibility of conflicting decisions between the Board and the courts and thus the union might secure a favorable adjudication of its claim by the Board but be held liable for damages by the court.

[7] Of course, the court below was also in error by asserting that "it is appropriate" that the Labor Board's jurisdiction over jurisdictional disputes "be exclusive." *N.L.R.B.* v. *Radio Engineers*, 364 U.S. 573 expressly held that Congress by allowing private damage suits in Section 303 has removed jurisdictional disputes from the exclusive domain of the Board, 364 U.S. at 584-585 following *Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237.

[8] It would be anomalous to refuse to enforce an agreement to arbitrate work assignment disputes out of deference to the Board's expertise, while the Board is required to look to the opinions of arbitrators to find guidance in resolving such disputes.

and Television Broadcast Engineers, 364 U.S. 573; *J.A. Jones Construction Co.*, 135 NLRB No. 139.

The need for uniformity and the avoidance of conflicts in the decision-making process underlie the preemption doctrine of the *Garner*[9] case. In *Dowd Box, Lucas Flour, Sinclair Refining* and *Evening News*, this Court held that these considerations are not applicable to suits to enforce agreements.

> "The fact that the two forums may disagree is not to be accepted as an argument for their not pursuing their separate courses. If it were, the Court would not have rejected the 'preemption' doctrine. The possibility of conflicting remedies is the very heart of the doctrine of the Garmon case which the Court holds is inapplicable to contract disputes." *Procter & Gamble Independent Union* v. *Procter & Gamble*, 51 LRRM 2752, 2757 (2nd Cir., December 10, 1962)

There is no sound or compelling reason to depart from these principles in a suit to enforce an agreement to arbitrate a work assignment dispute. To the contrary, even where a jurisdictional dispute exists, the Act encourages the parties to resolve their differences through private means.[10]

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[9] *Garner* v. *Teamsters*, 846 U.S. 485.

[10] "Moreover a reading of Section 10(k) of the National Labor Relations Act, 29 U.S.C.A. Section 160(k), above cited reveals the emphasis which Congress has placed on voluntary adjustment of work assignment disputes and dispels any notion that uniformity of decision is a paramount consideration in this area, for certainly the results reached in voluntary adjustments such as those in arbitration will not always be the same the Board would have reached if it had heard a particular case. We think that to hold that the District Court has no jurisdiction would run counter to the position which Congress has accorded to voluntary adjustments." *Local 33 of the International Hod Carriers Union* v. *Mason Tenders District Council*, 291 F.2d 496, 504 (2nd Cir. 1961).

Conclusion

This litigation involves neither a question of representation nor a jurisdictional dispute. It is essentially a controversy regarding the meaning of a contract, more particularly as to the contractual obligation of Raytheon to assign work encompassed by the agreement to the employee-members of the petitioner. To compel this employer to live up to its commitment to arbitrate would in no way interfere with the Board's functions since the Board could not resolve this dispute either under the representation or jurisdictional dispute sections of the Act. In any event this Court has made crystal clear in *Smith* v. *Evening News Association* that even where the Board's jurisdiction is conceded, such jurisdiction "is not exclusive and does not destroy the jurisdiction of the courts in suits under 301."

For the reasons hereinbefore set forth, we urge that the decision below should be reversed.

Respectfully submitted

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Appendix "A"

STATUTORY PROVISIONS INVOLVED

Sec. 8

(b) It shall be unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Sec. 9.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10.

. . . . .

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless,

within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Sec. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.